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Supreme Court, U.S.
FILED
DEC 29 1997
CLERK

No. 96-8986

In the Supreme Court of the United States

OCTOBER TERM, 1997

ARNOLD F. HOHN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

In light of the fact that the Court of Appeals denied the petitioner's request for a Certificate of Appealability, does this Court have jurisdiction to grant certiorari, vacate, and remand this case per the suggestion of the Solicitor General?

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (J.A. 41) is reported at 99 F.3d 892. The order denying rehearing en banc (J.A. 49) over the dissent of Judges Beam, Hansen, Loken, and McMillian is unreported. The opinion of the district court denying petitioner's motion under 28 U.S.C. § 2255 (J.A. 37) is unreported.

JURISDICTION

The court of appeals entered judgment on November 4, 1996. Rehearing was denied on February 10, 1997. A petition for a writ of certiorari was filed on May 12, 1997, and granted on October 31, 1997. For the reasons explained below, this Court has jurisdiction under 28 U.S.C. §§ 1254(1), 1651, and 2253.

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of 28 U.S.C. §§ 1254, 1651, 2244 and 2253 and 18 U.S.C. § 924 are reproduced in an appendix to this brief.

STATEMENT

Petitioner Arnold Hohn was convicted and is presently in federal custody for conduct — purportedly "using" a firearm in violation of 18 U.S.C. § 924(c) by merely having it "available" during the possession of a controlled substance — that this Court held in *Bailey* v. *United States*, 116 S. Ct. 501 (1995), is not a crime. After learning of the *Bailey* decision, Hohn filed his first and only motion pursuant to 28 U.S.C. § 2255 seeking collateral relief.

In response, the government conceded that the jury instruction given at Hohn's trial defining the term "use" in Section 924(c) was erroneous under *Bailey*. But the district court refused to consider the merits of Hohn's motion, holding — under a waiver doctrine that the Eighth Circuit and the

government have since renounced — that the claim was barred by Hohn's failure to anticipate this Court's decision in *Bailey*. J.A. 37. Hohn filed a timely notice of appeal, and the case was docketed in the court of appeals and assigned to a panel. J.A. 1, 40. But the court of appeals also declined to consider the merits of Hohn's claim, relying on a provision of the newly enacted Anti-terrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2253(c). That provision allows an appeal to be taken from the denial of a first Section 2255 motion only upon the issuance of a "certificate of appealability," which in turn requires "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The court held over a dissent that Hohn's claim involved the denial of a "statutory" rather than a "constitutional" right. J.A. 41-42.

Hohn petitioned for a writ of certiorari to determine whether the court of appeals erred in denying Hohn's application for a certificate of appealability and whether Hohn was entitled to relief. The government again confessed error, conceding that the court of appeals had erred in holding that Hohn had not claimed a denial of his constitutional rights. The government recommended that this Court grant certiorari, vacate the judgment of the court of appeals, and remand the case for further proceedings. The Court granted certiorari limited to the question whether the court of appeals' refusal to issue a certificate of appealability deprives this Court of jurisdiction to act in accordance with that recommendation.

1. On June 20, 1990, police searched Hohn's home after an informant told them that Hohn was selling methamphetamine. They found three firearms near methamphetamine in the kitchen, two firearms in a box in the kitchen, and one firearm a few feet away from methamphetamine in the bedroom. Tr. 163-168, 212, 418-420. In Hohn's bedroom, the police also observed a wall-mounted gun case containing a collection of rifles and shotguns. Tr. 508-509. When the police arrested him in his living room, Hohn was not carrying any weapon, and no weapons were found in the living room. J.A. 43; Tr. 367-368.

Hohn was indicted for possession of firearms by a felon under 18 U.S.C. §§ 922(g) and 924(a); possession of a controlled substance near a school with intent to distribute it, under 21 U.S.C. §§ 841(a) and 845(a); and "us[ing] or carr[ying] a firearm" "during and in relation to" the drug offense, under 18 U.S.C. § 924(c)(1). At trial, however, no witnesses testified that they had observed Hohn use or carry any weapon "during and in relation to" the predicate drug offense. Hohn admitted possession of methamphetamine and firearms but testified that he owned the firearms because he is an avid hunter, and because his house had been repeatedly burglarized and vandalized. J.A. 44; Tr. 1107-1110. Only one witness, Cindy Vandry, testified to having purchased, or witnessed a purchase, of drugs from Hohn. Vandry acknowledged that she had never seen Hohn use or carry any weapon, and that the only weapons she had observed when she visited his home were located in a closed, wall-mounted gun case. Tr. 454-456.

Consistent with then-controlling Eighth Circuit precedent and Eighth Circuit Model Jury Instructions (see note 2, *infra*), the trial court gave the following instruction to the jury on the meaning of the terms "use" and "carry" in 18 U.S.C. § 924(c):

> The phrase "used a firearm" means having a firearm available to aid in the commission of possession of Methamphetamine with intent to distribute. Similarly, the phrase "carried a firearm" does not require proof of actual possession of a firearm or use of it in any affirmative manner, but does require proof beyond a reasonable doubt that the firearm was available to provide protection in connection with the possession of Methamphetamine with intent to distribute or to facilitate success.

J.A. 10. The court overruled an objection that the instruction "allowed the jury to find that merely having a firearm available" nearby during a drug offense constitutes "use." J.A. 7-9.

Hohn was convicted on all three counts of the indictment and in July 1992 was sentenced to incarceration for 90 months

— 30 months for other crimes and 60 months (to be served consecutively) for the Section 924(c) conviction. Hohn was incarcerated for several years solely based on his conviction for "using or carrying" a firearm in violation of Section 924(c). He was released from prison on October 30, 1997, but remains in the custody of the Federal Bureau of Prisons under a program of home confinement that significantly restricts his liberty.[1]

2. Hohn appealed to the Eighth Circuit but did not challenge the "use or carry" jury instruction or his conviction under Section 924(c). At the time of his direct appeal, the Eighth Circuit — like most other courts — repeatedly had interpreted the term "use" in Section 924(c) expansively to include the "mere presence and availability" of a firearm in a house in which drugs were discovered.[2] Thus, the jury instruction given at Hohn's trial was consistent with settled Eighth Circuit law, and any argument to the contrary would have been rejected as frivolous. Hohn's conviction was affirmed on direct appeal. J.A. 12-26.

3. Several years later, this Court decided *Bailey*, substantially narrowing the range of conduct deemed criminal under Section 924(c)'s "use" prong. The Court held that, to "use" a firearm within the meaning of Section 924(c), a person must "active[ly] employ[]" it by "brandishing, displaying, bartering, striking with, * * * firing or attempting to fire" the weapon. 116 S. Ct. at 508. The Court explicitly repudiated decisions, like the Eighth Circuit's, in which the only nexus required between a firearm and a drug offense was the "availability," "accessibility," or "proximity" of the firearm to the defendant during the offense. *Id.* at 506, 508.

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[1] As a parolee in the Home Confinement program, Hohn remains in federal custody. See *Jones* v. *Cunningham*, 371 U.S. 236, 243 (1963).

[2] See *United States* v. *McKinney*, 79 F.3d 105, 108-109 (8th Cir. 1996). *E.g.*, *United States* v. *Sykes*, 977 F.2d 1242, 1248 (8th Cir. 1992). Accord EIGHTH CIRCUIT MANUAL OF CRIMINAL MODEL JURY INSTRUCTIONS § 6.18.924, at 197-199 & n.9 (1994).

Because Hohn had neither "used" a firearm as this Court interpreted that term in *Bailey*, nor "carried" one during and in relation to a drug offense, and hence was incarcerated for conduct that Section 924(c) does not criminalize, he moved on January 24, 1996, to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255.[3] The government conceded in response that the jury instruction at Hohn's trial on firearm "use" was invalid under *Bailey*. J.A. 32. Nevertheless, the district court dismissed Hohn's motion because, in its view, Hohn had knowingly and intentionally "waived" his right to relief by failing to "raise his *Bailey* claim" on direct appeal, several years before *Bailey* was decided. J.A. 37. The district court relied (*ibid.*) on the Eighth Circuit's decision in *United States* v. *McKinney*, 79 F.3d 105, 109 (8th Cir. 1996).[4] The district court neither explored the applicability of doctrines (such as cause and prejudice, or fundamental miscarriage of justice) under which a "waiver" (or procedural default) has traditionally been excused, nor examined the merits of Hohn's claims.

4. Several months after Hohn filed his Section 2255 motion, on April 24, 1996, the President signed into law the AEDPA. The new law modified 28 U.S.C. § 2253 to require, for the first time, that federal prisoners obtain a "certificate of appealability" as a predicate to an "appeal * * * from * * * the

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[3] In his Section 2255 motion, Hohn argued, among other things, that: "his conduct was not a violation of 18 U.S.C. § 924(c)(1) as interpreted by *Bailey*," "a fundamental miscarriage of justice would result unless the court addressed the issue," "he should not be penalized for not raising the issue on direct appeal because he relied on years of Eighth Circuit precedent," and "he was prejudiced by the jury instruction" defining "firearms use." J.A. 44.

[4] After the petition for certiorari was filed in this case, this Court vacated and remanded (117 S. Ct. 1816 (1997)) the Eighth Circuit's judgment in *McKinney* for reconsideration in light of *Johnson* v. *United States*, 117 S. Ct. 1544, 1549 (1997). On remand, the Eighth Circuit abandoned its prior waiver doctrine, applied the plain error doctrine, and granted McKinney relief. *United States* v. *McKinney*, 120 F.3d 132 (1997).

final order in a proceeding under section 2255." It provides that a certificate may issue only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

Hohn filed a timely notice of appeal from the district court's dismissal of his Section 2255 motion on July 29, 1996. J.A. 40. On August 13, 1996, Hohn's "case [was] docketed" in the court of appeals. J.A. 4. Apparently assuming that the AEDPA applied to Hohn's case, the court of appeals construed the notice of appeal as an application for a certificate of appealability (*id.*) pursuant to amended Federal Rule of Appellate Procedure 22(b). The "case [was] submitted to a panel" of three judges. *Id.* In a published opinion, the panel majority denied Hohn's request for a certificate of appealability over the vigorous dissent of Judge McMillian. The majority asserted that the AEDPA's requirement of a "substantial showing of the denial of a constitutional right" (28 U.S.C. § 2253(c)(2)) was not satisfied because, in its view, "petitioner is not making a constitutional claim" but rather only "a claim to a federal statutory right." J.A. 41-42. In support of that proposition, the majority observed that this Court in *Bailey* "interpret[ed] a statute." *Id.* at 42. The majority rejected the argument that the Constitution forbids the government to incarcerate an individual for conduct that is not criminal. It reasoned: "The Constitution does not guarantee that judges will always be right." *Ibid.* The panel did not address Hohn's constitutional challenge to the erroneous jury instruction at all.

In dissent, Judge McMillian argued that Hohn's claim is clearly rooted in the Fifth Amendment's Due Process Clause. J.A. 46-48. He explained that the Due Process Clause forbids incarceration of a person based on a conviction for conduct that this Court has determined is not criminal. *Id.*

Hohn sought rehearing and rehearing en banc, arguing that his Section 2255 motion was premised on his due process rights (1) not to be incarcerated for conduct that does not constitute a crime; and (2) to be convicted only upon proof beyond a

reasonable doubt of each and every element of a crime. Reh'g Pet. 7-9. The court denied Hohn's petition with Judges Beam, Hansen, Loken, and McMillian voting for rehearing. J.A. 49.

5. Hohn filed a petition for a writ of certiorari on May 12, 1997. Hohn's first question challenged the panel majority's holding that a certificate of appealability could not issue because his claim involved the denial of a "statutory," rather than a "constitutional," right. Hohn also requested that the Court reach the merits of the appeal the Eighth Circuit had declined to allow, by considering the scope of the "carry" prong of 18 U.S.C. § 924(c) and the validity of the Eighth Circuit's waiver doctrine in light of *Johnson* v. *United States*, 117 S. Ct. 1544 (1997). See note 4, *supra*.

The government confessed error, "agree[ing] that claims of the kind raised by petitioner in his motion under Section 2255 may fairly be characterized as 'constitutional,' and that the court of appeals erred in concluding otherwise." U.S. Resp. 7. It suggested that "the petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded" (*id.* at 15) to allow the Eighth Circuit to decide whether Hohn's concededly constitutional claims were "substantial" within the meaning of Section 2253(c)(2) (*id.* at 9-10).

The government also observed that, after Hohn's certiorari petition was filed, this Court had announced its decision in *Lindh* v. *Murphy*, 117 S. Ct. 2059 (1997). In *Lindh*, the Court held that the AEDPA "reveals Congress's intent to apply the amendments to chapter 153," which include the certificate-of-appealability requirement, "only to such cases as were filed after the statute's enactment." *Id.* at 2063. Hohn's case was filed in the district court before the effective date of the AEDPA. Nonetheless, the government urged the Court not to grant certiorari to consider whether, under *Lindh*, the certificate-of-appealability requirement was applicable to Hohn's case. It argued that Hohn's "case is subject to the Act's certificate of

appealability requirement because the *appeal*" — which, the government maintained, is "the relevant case" rather than the "original 'case' filed in the district court" (U.S. Resp. 11 (emphasis added)) — was filed after the Act's effective date.[5]

In reply, Hohn argued that a remand to determine the substantiality of the constitutional question was unnecessary and the Court should summarily reverse the decision to withhold a certificate of appealability. Pet. Reply Br. 2-7. He further argued that summary reversal was appropriate because, in light of *Lindh*, no certificate was required in his case. *Id.* at 8-9.

On October 31, 1997, this Court granted Hohn's petition for certiorari limited to the following question: "In light of the fact that the Court of Appeals denied the petitioner's request for a Certificate of Appealability, does this Court have jurisdiction to grant certiorari, vacate, and remand this case per the suggestion of the Acting Solicitor General?" J.A. 50.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns the power of this Court to review improper refusals by courts of appeals to allow statutorily authorized appeals. For Hohn, it implicates the power of the Court to correct a series of egregious judicial errors that have deprived him of even one collateral review on the merits of his claims — which the government has all but admitted to be meritorious — that his incarceration is unlawful and that he is innocent of the crime of which he was convicted.

This Court ruled in *House* v. *Mayo*, 324 U.S. 42, 44 (1945), that it has jurisdiction under the All Writs Act (now codified at 28 U.S.C. § 1651) to correct such an erroneous decision by a court of appeals "declining to allow an appeal" to it

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[5] The government also suggested that review of the applicability of the certificate requirement was unwarranted because it "is unlikely * * * to be determinative of the appeal in this case" (U.S. Resp. 13) — perhaps because Hohn's entitlement to a certificate of appealability is clear.

for lack of a certificate of probable cause. The Court has routinely exercised that power, and apparently also its statutory certiorari power under 28 U.S.C. § 1254, in cases procedurally identical to Hohn's for more than half a century.

The Court should not reverse that undoubtedly correct construction of its common-law certiorari power now. Use of the writ in this circumstance is fully consistent with the writ's traditional role as a tool for rectifying lower courts' errors in discerning the reaches of their own jurisdiction. The writ is a proper means of reinstating a case over which a lower court has improperly disavowed jurisdiction. It is "appropriate in aid of" the Court's own appellate jurisdiction (28 U.S.C. § 1651) because it prevents a lower court from pretermitting an appeal on the merits over which the Court would have appellate jurisdiction were it permitted to proceed.

Although the Court in *House*, and several Justices in later opinions, have questioned the Court's jurisdiction to issue *statutory* writs of certiorari to review decisions declining appeals, the Court nonetheless appears to have issued such writs frequently over the years. Because the brief discussion of the statutory certiorari power in *House* is flawed, contravenes the plain language of Section 1254, and appears to have been renounced by this Court in subsequent decisions, the Court should take this opportunity to confirm — as the Court's practice suggests — that the Section 1254 power extends to *all* judicial proceedings in the courts of appeals, including applications for certificates of appealability. Section 1254 gives this Court "a comprehensive and unlimited power" (*Forsyth* v. *Hammond*, 166 U.S. 506, 513 (1897)) to review by writ of certiorari "*any* * * * case" that is "in the circuit court of appeals." By its plain language, this provision authorizes the Court to review *any* judicial proceeding "in the courts of appeals." An application for a certificate of appealability — a request for relief upon which one or more judges of the court of appeals render a decision — is therefore itself a "case[] in the court[] of appeals," regardless whether the court of appeals decides to permit any "appeal * * * from

* * * the final order in a proceeding under section 2255" to "be taken." 28 U.S.C. § 2253(c)(1)(B).

This conclusion is confirmed by the Court's decisions in *United States* v. *Nixon*, 418 U.S. 683 (1974), and *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982), which suggest that the statutory certiorari power extends to all cases in the courts of appeals over which they properly had jurisdiction. The court of appeals had jurisdiction over petitioner's application for a certificate of appealability for two reasons. First, Section 2253 expressly gives the judges of the courts of appeals the jurisdiction (and duty) to adjudicate such applications. 28 U.S.C. § 2253(c). See *In re Burwell*, 350 U.S. 521 (1956). Second, courts of appeals *always* have the jurisdiction to decide whether they have jurisdiction over the merits of a proffered appeal. The jurisdictional question over the merits of a proffered appeal therefore is always properly "in the courts of appeals" and this Court therefore always has the power to reach it by issuing a statutory writ of certiorari. See *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982).

Section 2253 not only does not abrogate this Court's certiorari power over certificate decisions; it suggests a congressional design to affirm that power. When Congress amended the AEDPA, it was legislating against a background of more than half a century of Supreme Court decisions reversing courts of appeals' certificate decisions on writs of certiorari. That Congress was cognizant of this Court's practice is beyond dispute, as evidenced by Section 2244, an analogous gatekeeping provision monitoring access to district courts for successive habeas petitions. Congress expressly barred review of those Section 2244 gatekeeping decisions by "appeal[] * * * or * * * writ of certiorari." 28 U.S.C. § 2244(b)(3)(E). In contrast, Section 2253 does not mention, let alone abolish, this Court's often-exercised certiorari power. Congress's decision expressly to ban certiorari review over gatekeeping decisions concerning successive habeas petitions strongly suggests that its failure to preclude certiorari review over gatekeeping decisions

concerning first petitions, like Hohn's, was intentional. See *Lindh*, 117 S. Ct. at 2064. Construction of the AEDPA in this manner also furthers its purpose of easing the burden of habeas petitions upon this Court by ensuring one full, fair review in the courts below. Were the Court's certiorari power proscribed, its capacity to correct circuit-wide errors and conflicts in applying the statutory standards for certificate issuance would be impaired. The Court may expect to be flooded with meritorious original applications for certificates that the lower courts have improperly rebuffed.

Regardless of the outcome of that question about the Court's certiorari power where a certificate to appeal has been denied, it is now apparent that the Court has jurisdiction to grant, vacate, and remand because petitioner was not required to obtain any certificate to pursue his appeal. This Court decided in *Lindh* v. *Murphy*, after Hohn's petition for certiorari was filed, that Chapter 153 of the AEDPA, which includes the certificate requirement, is applicable only to habeas "cases [that] had been filed after the date of the Act." *Id.* at 2063. Hohn's case was filed before the Act and consequently should be remanded to permit his appeal on the merits to proceed.

Finally, if the Court overrules *House* v. *Mayo* and holds that it lacks jurisdiction to review the decision below, petitioner respectfully requests that the Court or any individual Justice issue a certificate of appealability. See *Davis* v. *Jacobs*, 454 U.S. 911, 913-914 (1981) (opinion of Stevens, J.).

ARGUMENT

I. THIS COURT HAS JURISDICTION UNDER 28 U.S.C. § 1254(1) TO ISSUE A WRIT OF CERTIORARI

Section 1254 of Title 28 authorizes this Court to exercise review over "[c]ases in the courts of appeals" through two methods. First, the Court may exercise jurisdiction "[b]y writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or

decree." 28 U.S.C. § 1254(1). Second, this Court may exercise jurisdiction over "[c]ases in the courts of appeals" by "certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy." 28 U.S.C. § 1254(2). This case concerns the meaning of the grant of statutory certiorari jurisdiction under Section 1254(1).

Despite the frequency with which this Court has exercised jurisdiction under Section 1254(1), it has never clearly delineated the outer boundaries of its authority under that provision. Shortly after the precursor to Section 1254(1) was enacted in 1891, this Court described Congress's grant of certiorari authority in broad terms as "a comprehensive and unlimited power." *Forsyth*, 166 U.S. at 513.[6] The Court noted that "[u]p to the time of the passage of the act of 1891, creating the circuit courts of appeal, the theory of federal jurisprudence had been a single appellate court, to wit, the supreme court of the United States, by which a final review of *all cases* of which the lower federal courts had jurisdiction was to be made." *Id.* at 511-512 (emphasis added). The 1891 Act assigned the newly

[6] The Court was describing Section 6 of the Evarts Act, which conferred jurisdiction upon the newly created circuit courts of appeals to hear certain appeals from the federal trial courts and further provided that "in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court." Act of Mar. 3, 1891, ch. 517, § 6, 23 Stat. 828. In *American Constr. Co.* v. *Jacksonville Ry. Co.*, 148 U.S. 372 (1893), this Court interpreted the statute's reference to "case[s] * * * *made final* in the circuit court of appeals" extremely broadly, holding that it signified "cases in which the statute makes the judgment of that court final; not [ ] cases in which that court has rendered a final judgment." *Id.* at 385 (emphasis added).

created courts of appeals authority to decide appeals, but it vested in this Court a "broad and comprehensive" power to review by writ of certiorari all cases in the courts of appeals. *Id.* at 513. Focusing on the language of the certiorari provision (see note 6, *supra*), the Court explained:

> It applies to every case in which but for it the decision of the circuit court of appeals would be absolutely final * * *. Unquestionably the generality of this provision was not a mere matter of accident. It expressed the thought of congress distinctly and clearly, and was intended to vest in this court a comprehensive and unlimited power. The power thus given is not affected by the condition of the case as it exists in the court of appeals. It may be issued *before or after any decision by that court, and irrespective of any ruling or determination therein.* All that is essential is that there be a case pending in the circuit court of appeals * * *.

Forsyth, 166 U.S. at 513 (emphasis added). "[T]he power of this court in certiorari," the Court concluded, "extends to every case pending in the circuit courts of appeal, [and] * * * is coextensive with all possible necessities and sufficient to secure to this court a final control over the litigation in all the courts of appeal." *Id.* at 514.

Fifty years later, Congress had *expanded* the language of the certiorari statute.[7] Yet this Court, in *House* v. *Mayo*, 324 U.S. 42 (1945) (per curiam), endorsed without analysis a dra-

[7] Section 240(a) of the Act of February 13, 1925, commonly known as the Judges Bill, provided: "In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by writ of error or appeal." Act of Feb. 13, 1925, ch. 229, § 240(a), 43 Stat. 938-939.

matically constricted understanding of its statutory certiorari jurisdiction, under which the court of appeals' decision that it did not have jurisdiction over an appeal insulates its entire decision — including its refusal to accept jurisdiction — from statutory certiorari review. *House* involved a state prisoner who was denied federal habeas corpus and a certificate of probable cause[8] by the district court, and whose application for leave to appeal in forma pauperis was denied by the court of appeals because he failed to present a certificate of probable cause. *Id.* at 43-44. This Court opined that it "cannot issue a writ of certiorari in the present case under § 240(a) of the Judicial Code." *Id.* at 44. The Court's entire analysis was as follows:

> Our authority under [section 240(a)] extends only to cases "in a circuit court of appeals, or in the (United States) Court of Appeals for the District of Columbia." Here the case was never "in" the court of appeals, for want of a certificate of probable cause.

Ibid.[9] The Court nevertheless held that it had jurisdiction under the All Writs Act, currently codified at 28 U.S.C. § 1651, to grant a writ of certiorari to "review the action of the court of appeals in declining to allow an appeal to it" for lack of a certificate. The Court also held that the All Writs Act

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[8] "Certificates of probable cause" are the precursors of the "certificates of appealability" required by the AEDPA and are functionally indistinct for most relevant purposes. Before enactment of the AEDPA, Section 2253 required State prisoners to obtain a "certificate of probable cause" to appeal from a denial of a federal habeas petition. The AEDPA extended that requirement to federal prisoners and codified the standard for its issuance articulated in *Barefoot* v. *Estelle*, 463 U.S. 880, 893 n.4 (1983), requiring a "substantial showing of the denial of [a] federal right."

[9] The per curiam opinion in *House* cites as support for the conclusion that there is no authority to issue a statutory writ of certiorari the per curiam decision in *Ferguson* v. *District of Columbia*, 270 U.S. 633 (1926), which consists of a single paragraph and, like *House*, contains no analysis.

authorized it to reach the merits of the appeal the lower court had improperly declined to permit. *House*, 324 U.S. at 44.

A decade later, in *In re Burwell*, 350 U.S. 521 (1956), the Court implicitly *rejected* the construction of Section 1254 endorsed in *House* — *i.e.*, that a court of appeals' decision denying leave to appeal insulates that decision from review under the Court's statutory certiorari power. In *Burwell*, the Court exercised jurisdiction over questions certified by the Ninth Circuit under the predecessor to 28 U.S.C. § 1254(2) — which, like Section 1254(1), applied only to "cases in the courts of appeals" — in a case in which the court of appeals had dismissed applications for leave to appeal.[10] Thus, under *Burwell*, the court of appeals' erroneous decision to decline jurisdiction over an appeal was no bar to this Court's review of that predicate decision on a statutory writ of certiorari.

After *Burwell*, the Court routinely, without specifying the source of its jurisdiction, issued writs of certiorari to review denials of leave to appeal despite the petitioner's failure to follow the Court's then-applicable procedures for obtaining extraordinary writs, which required a separate motion requesting leave to file a petition.[11] The Court has similarly exercised jurisdiction, without comment as to its source, in a large number

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[10] The likelihood that the Court overlooked the question whether it had jurisdiction to decide the certified questions is slim: "This court has * * * been careful not to exceed its lawful jurisdiction in this class of [certified question] cases." *Jewell* v. *Knight*, 123 U.S. 426, 433 (1887). See REYNOLDS ROBERTSON & FRANCIS R. KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES § 124, at 222 (1936).

[11] See 17 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 4036 at 14 n.12 (2d ed. 1988) (citing *Head* v. *California*, 374 U.S. 509 (1963)). See also, *e.g.*, *Humphrey* v. *Cady*, 405 U.S. 504 (1972); *Jennings* v. *Ragen*, 358 U.S. 276 (1959) (per curiam). The Court abandoned that requirement in 1980. See 17 WRIGHT, MILLER & COOPER, *supra*, § 4036 at 14 n.12.

of denial-of-leave-to-appeal cases in which the petitioner invoked solely the Court's statutory writ jurisdiction.[12]

Finally, in *United States* v. *Nixon*, *supra*, and *Nixon* v. *Fitzgerald*, *supra*, this Court held that the question whether a case is "in the court[] of appeals" under Section 1254(1) hinges not on what the court of appeals *actually did* but on what it *had the jurisdictional power to do*. The *Nixon* cases, like *Burwell*, thus suggest (contrary to *House*) that any case over which the court of appeals could properly have exercised its jurisdiction was "in the court[] of appeals," the court of appeals' own decision to the contrary notwithstanding.

As the foregoing makes plain, this Court's understanding of the reaches of the statutory certiorari power has fluctuated. This case presents the Court with an opportunity to clarify that the expansive construction of the statutory certiorari power the Court initially endorsed (and presently exercises) is the correct one — and indeed the only one to which the language of the statutory text is amenable.[13]

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[12] See, *e.g.*, *Lynce* v. *Mathis*, 117 S. Ct. 891 (1997) (certificate of probable cause); *Lozada* v. *Deeds*, 498 U.S. 430 (1991) (same); *Selvage* v. *Collins*, 494 U.S. 108 (1990) (same); *Graham* v. *Lynaugh*, 492 U.S. 915 (1989) (same); *Allen* v. *Hardy*, 478 U.S. 255 (1986) (same); *Nowakowski* v. *Maroney*, 386 U.S. 542 (1967) (in forma pauperis); *Phelper* v. *Decker*, 385 U.S. 18 (1966) (same); *Ellis* v. *United States*, 356 U.S. 674 (1958) (same); *Farley* v. *United States*, 354 U.S. 521 (1957) (same); *Adkins* v. *E.I. DuPont de Nemours & Co.*, 335 U.S. 331 (1948) (same).

[13] Several commentators have questioned the assumption that the Court lacks statutory certiorari jurisdiction to review denials of certificates of probable cause. See, *e.g.*, RICHARD FALLON, DANIEL MELTZER & DAVID SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS & THE FEDERAL SYSTEM 1680 (4th ed. 1996) (questioning the proposition that denials of certificates of probable cause are not "in" the courts of appeals and observing that the Court has exercised its certiorari power to review other cases over which the courts of appeals lacked jurisdiction); 17 WRIGHT, MILLER & COOPER, *supra*, § 4036, at 16 (1988) (opining that "statutory (continued...)

A. The Plain Language Of The Statute Confers Jurisdiction Over Any "Case[] In The Court[] Of Appeals"

By its plain meaning, Section 1254(1) authorizes review of the Eighth Circuit's decision rejecting petitioner's application for a certificate of appealability. The language of the statutory grant is broad and inclusive: "*Cases in the courts of appeals* may be reviewed by the Supreme Court by * * * writ of certiorari granted upon the petition of *any* party to *any* civil or criminal *case*, *before or after* rendition of judgment or decree." 28 U.S.C. § 1254(1) (emphasis added).

Section 1254(1) contains no restrictions as to the kinds of "case" the Court may review: it sets forth no requirements as to the procedural posture the "case" must be in, the sort of questions the "case" may present, or the nature of the decision, if any, the court of appeals must have rendered. As this Court correctly explained in *Forsyth*, the "power thus given is not affected by the condition of the case as it existed in the court of appeals" and "may be exercised before or after *any decision* by that court, and *irrespective of any ruling or determination therein*." 166 U.S. at 513 (emphasis added). See *National Farmers Union Ins. Cos.* v. *Crow Tribe of Indians*, 468 U.S. 1315, 1318 (1984) (Rehnquist, J., in chambers) ("*Every* decision of a United States district court or of a court of appeals is reviewable by this Court either by way of appeal or by certiorari. §§ 1252-1254; cf. § 1291.") (emphasis added). Cf. *United States* v. *Shipp*, 203 U.S. 563, 573 (1906) ("even if the circuit court had no jurisdiction * * * and if this court had no jurisdiction of the appeal, this court, and this court alone, could

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[13] (...continued)
certiorari should be available" to review denials of certificates of probable cause" because "[l]eave to appeal can be denied only after the court of appeals has so far considered the merits of the questions presented as to have brought the case within any reasonable purpose of the requirement that it be in that court").

decide that such was the law"). In short, "the sole essential of this Court's jurisdiction to review is that there be a case pending in the circuit court of appeals." *Gay* v. *Ruff*, 292 U.S. 25, 30 (1934).

The proceedings in the Eighth Circuit plainly qualify as a "case." Since 1891, when Congress enacted the precursor to Section 1254, the word "case" has been understood as "[a] general term for an action, cause, suit, or controversy, at law or in equity." BLACK'S LAW DICTIONARY 175 (1891); BLACK'S LAW DICTIONARY 215 (6th ed. 1990). The term encompasses "any proceeding judicial in its nature." *Ibid.* See *Blyew* v. *United States*, 80 U.S. (13 Wall.) 581, 595 (1871) ("The words 'case' and 'cause' are constantly used as synonyms in statutes and judicial decisions, each meaning *a proceeding in court*, a suit, or action.") (emphasis added); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 112-113 (1866) (holding that the interchangeable term "suit" "is certainly a comprehensive one, and appl[ies] to any proceeding in a court of justice by which an individual pursues that remedy which the law affords him"). Cf. *In re Quirin*, 317 U.S. 1, 24 (1942) (mere "[p]resentation of [a] petition for judicial action is the institution of a suit"). There can be no serious dispute that what occurred in the court of appeals was a "proceeding judicial in its nature" and therefore a "case" within the meaning of Section 1254(1).

Nor can there be any doubt that the judicial proceeding that resulted in the Eighth Circuit's published opinion took place before a "court of appeals." The courts of appeals are the intermediate federal appellate courts, which "consist of the circuit judges of the circuit." 28 U.S.C. § 43. See BLACK'S LAW DICTIONARY 355 (6th ed. 1991). The action of the Eighth Circuit panel in this case (not to mention the denial of the suggestion

for rehearing by the en banc court) undeniably was the action of a "court of appeals" within the meaning of Section 1254(1).[14]

Although this Court in *House* v. *Mayo* suggested otherwise, it is difficult to understand how the "case" that was plainly before the court of appeals could not be "in" that court. Contrary to the suggestion of *House*, there is no talismanic significance to Section 1254(1)'s reference to cases "*in* the courts of appeals." Instead, that phrase is intended merely to indicate where the proceedings are occurring. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1139 (1986) (the word "in" "indicate[s] location or position"). It is possible that the phrase also is intended to distinguish cases that are subject to the Court's certiorari power under Section 1254 from cases that are decided by "a district court" and are subject to the Court's appellate power under Section 1253. See 28 U.S.C. § 1253; Act of Feb. 13, 1925, ch. 229, § 238, 43 Stat. 938.

Thus, under the plain meaning of Section 1254(1), a "case" is "in the court[] of appeals" when a request for legal relief is lodged there and a judicial proceeding ensues. The proceedings below easily satisfied these minimal requirements. As the court of appeals' docket sheet demonstrates, petitioner filed a notice of appeal, which the court of appeals treated as an application for a certificate pursuant to Federal Rule of Appellate Procedure 22(b) (J.A. 4); petitioner's "case" was then "docketed" in the court of appeals as case No. 96-3118 (*id.*); the "case [was] submitted to a panel" for consideration and decision (*id.*); "the

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[14] Even in a case in which the application for a certificate of appealability is ruled on by a single circuit judge rather than (as here) by a three-judge panel, the proceedings occur "in the court[] of appeals." This Court has held explicitly that Section 2253 vests jurisdiction to adjudicate applications for certificates of probable cause in the *courts of appeals*, notwithstanding that section's reference to circuit judges; and that Section 2253 grants *courts of appeals* discretion to choose whether that jurisdiction should be exercised by the court as a whole or by individual circuit judges. *In re Burwell*, 350 U.S. 521 (1956); see also F. R. A. P. 22(b).

court" considered the case and "filed [a published] opinion" that included a "dissent" (J.A. 5) and entered a "judgment * * * denying [the] application for [a] Certificate of Appealability" (*id.*); petitioner then submitted a "petition for rehearing with suggestion for rehearing en banc" (*id.*), to which the United States, after a "judge order" was entered granting it an extension of time (*id.*), filed an opposition (*id.*); the court entered an "order" denying the petition for rehearing, with four judges voting to grant it (J.A. 5-6); and the court "issued" its "mandate" (J.A. 6). "[A]t the end of the appellate proceedings," the record was returned by the court of appeals to the district court. *Id.* These proceedings were more than enough to create a case in the court of appeals.[15]

The minimal prerequisites for a "case[] in the court[] of appeals" are perfectly sensible, in view of the occasional need for this Court to grant review "before * * * judgment." 28 U.S.C. § 1254(1). In *United States* v. *Nixon*, *supra*, for example, this Court granted a statutory writ of certiorari to review a case in which the notice of appeal to the court of appeals and the certiorari petition were filed on the same day. *Id.* at 689-690. This Court held that there was a case in the court of appeals because "the appeal was timely filed and all other procedural requirements were met," and the court of appeals had jurisdiction to review the order from which the petitioner had appealed. *Id.* at 690. The same result is appropriate here. Were the Court to adopt a narrower construction, it might be precluded from exercising swift review in the occasional cases

[15] The court of appeals' own conviction that "the appellate proceedings" were a "case" is reflected throughout its docket sheets (J.A. 3-6), and in its treatment of its opinion in the case as binding circuit precedent. See *United States* v. *Apker*, 101 F.3d 75 (8th Cir. 1996), petition for cert. pending, No. 97-5460. Other circuits have relied on the panel's decision as well. See, *e.g.*, *United States* v. *Eyer*, 113 F.3d 470, 474 (3d Cir. 1997); *United States* v. *Rocha*, 109 F.3d 225, 227-228 n.2 (5th Cir. 1997); *Lozada* v. *United States*, 107 F.3d 1011, 1013 (2d Cir. 1997); *United States* v. *Lorentsen*, 106 F.3d 278, 279 (9th Cir. 1997).

that warrant such emergency treatment. See, *e.g.*, *Mistretta* v. *United States*, 488 U.S. 361, 371 (1989); *Dames & Moore* v. *Regan*, 453 U.S. 654, 688 (1981); *United States* v. *United Mine Workers*, 330 U.S. 258, 269 (1947).

In sum, it is difficult to imagine what the proceeding below was if not a "case": it commenced with a request for legal relief the court of appeals had the power to grant; it entailed litigation; and it resulted in a judgment dramatically affecting a party's legal rights and an opinion that has precedential effect in other cases. It is equally difficult to divine where that case occurred if not "in" the court of appeals. It certainly did not occur "in" the district court: neither the record nor any of the legal briefs in that proceeding were physically lodged in the district court from the date on which the appeal was docketed in the court of appeals until the record was returned "at the end of the appellate proceedings"; and none of the pertinent orders or judgments that disposed of the proceedings on petitioner's application issued from the district court. J.A. 3-6. The proceedings in the Eighth Circuit thus clearly satisfy the plain language of Section 1254(1).

B. The Proceedings On An Application For A Certificate Of Appealability Are No Less A "Case[] In The Court[] Of Appeals" Because The Application Is An Original Proceeding Separate From The Merits Of The Appeal

1. This Court's decision in *House* v. *Mayo* rested on the unstated assumption that there can be no "case[] in the court[] of appeals" unless and until that court entertains the *merits* of the appeal. That assumption is false. Even if the Court's statement that "the case was never 'in' the court of appeals" (324 U.S. at 44) is correct as to the *appeal from the district court's denial of habeas relief*, which Section 2253 forbade "for want of a certificate of probable cause," it is flatly incorrect as to the *application for a certificate of probable cause* itself.

Although Section 2253 expressly forbids a court to accept jurisdiction over an "appeal * * * from * * * the final order in a proceeding under section 2255," it simultaneously *confers jurisdiction* on the judges of the courts of appeals to determine whether a certificate of appealability should issue. 28 U.S.C. § 2253(c)(1) (authorizing "a circuit justice or judge [to] issue[] a certificate of appealability"). In terms of the "gatekeeping" metaphor (*Felker* v. *Turpin*, 116 S. Ct. 2333, 2337 (1996)), Section 2253 leaves the district court's merits decision at the gate of the court of appeals but allows the petitioner, armed with his request for a certificate of appealability, to enter the court of appeals to plead for the merits' admission. Thus, Section 2253 expressly authorizes the application for a certificate to be made "in the court[] of appeals" to a circuit judge or judges.

The fact that the certificate-of-appealability determination is in the court of appeals separately from the merits appeal poses no bar to this Court's statutory certiorari review. This Court has never interpreted "cases in the courts of appeals" to be limited to "cases on the merits," or "cases that include the merits." Indeed, the Court has often expressly recognized its statutory certiorari power to review cases in the courts of appeals that involve matters tangential to the merits, even when litigation of the merits is proceeding below. In *Nixon* v. *Fitzgerald*, 457 U.S. at 742, the Court rejected the argument that an appeal from an order denying a claim of immunity "was not an appealable 'case' properly in the court of appeals within the meaning of §1254." Similarly, in *United States* v. *Nixon*, this Court held that an appeal from a denial of a discovery motion was a case properly before the Court on a statutory writ of certiorari. And in *Schlagenhauf* v. *Holder*, 379 U.S. 104, 109 (1964), the Court granted a statutory writ of certiorari to review a court of appeals' refusal to issue a writ of mandamus to reverse an intrusive discovery order entered by the district court.

2. The fact that an application for a certificate is not an appeal from a district court order, but rather is filed as an original matter in the court of appeals, can only help to bolster the proposition that the matter qualifies as a "case[] in the court[] of appeals." The plain language of Section 1254 appears carefully crafted *not* to limit certiorari jurisdiction to review of "appeals in the courts of appeals." Instead, the language is broad and general, giving this Court certiorari jurisdiction to review cases of *all* kinds that may arise "in the courts of appeals." For example, this Court granted statutory certiorari in *Schlagenhauf* to review the disposition of an original petition for mandamus filed in the court of appeals. 379 U.S. at 109. Indeed, this Court has often granted certiorari to review grants and denials of original petitions for writs of mandamus by the courts of appeals. See *Will* v. *United States*, 389 U.S. 90, 94-95 (1967) (granting certiorari to vacate a writ of mandamus); *Kerr* v. *United States District Court*, 426 U.S. 394, 401 (1976) (granting certiorari to affirm a denial of mandamus).[16] In sum, the fact that an application for a certificate of appealability is filed as an original matter in the court of appeals and is separate from and preliminary to the merits appeal does not deprive this Court of power to exercise jurisdiction under Section 1254(1).

C. Because Section 1254(1) Authorizes This Court To Review All Cases Over Which The Court Of Appeals Properly Has Jurisdiction, Certiorari Jurisdiction Exists In This Case

In its more recent decisions concerning the scope of Section 1254(1), the Court has implicitly repudiated *House* v. *Mayo* by suggesting that whether a case is "in the court[] of appeals" hinges not on whether the court of appeals actually accepted jurisdiction but on whether it should have. In *Nixon* v. *Fitzgerald*, 457 U.S. at 743, the Court held that because the

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[16] Although the Court did not specifically invoke Section 1254(1) as the source of its certiorari jurisdiction in those cases, neither did it suggest that it had concluded the cases were appropriate for issuance of an extraordinary writ pursuant to the All Writs Act.

"petitioner [had] presented a[n] * * * appealable question to the Court of Appeals[, i]t follow[ed] that the case was 'in' the Court of Appeals under § 1254 and properly within [its] certiorari jurisdiction" even though the court of appeals had determined that it lacked jurisdiction. Similarly, in *United States* v. *Nixon*, 418 U.S. at 690, the Court held that "the petition [for certiorari] is properly before this Court for consideration if the District Court order was final" and therefore within the appellate jurisdiction of the court of appeals under 28 U.S.C. § 1291. These decisions suggest that the Court considers the court of appeals' jurisdiction to be a prerequisite to its own statutory certiorari jurisdiction.[17]

As we next demonstrate, although there are several ways in which the approach of the *Nixon* cases could be applied here, the result is in each case the same: this Court has statutory certiorari jurisdiction to review the proceedings below. *First*, the court of appeals properly had jurisdiction because Section 2253 expressly vests it with jurisdiction to consider applications for certificates of appealability. *Second*, this Court's precedents confirm that all jurisdictional determinations (such as those made by courts of appeals pursuant to Section 2253) are reviewable regardless of the decision reached by the court of appeals.

1. Section 2253 expressly gives the judges of the courts of appeals jurisdiction to receive and decide applications for certificates of appealability. Indeed, this Court has held that courts of appeals not only may, but must, accept the jurisdiction Section 2253 confers on them to decide such applications. In *In re Burwell*, the Court explained why, on writ of certiorari, it had reversed the dismissal of applications for certificates: "[t]he Ninth Circuit was in error in deeming itself without jurisdiction

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[17] We submit that this newer approach, while an improvement on *House* v. *Mayo*, is hardly compelled by the language of Section 1254, which refers to "cases in the courts of appeals," not to "cases *properly* in the courts of appeals." Congress could have written the statute to require that the courts of appeals properly have jurisdiction, but did not.

to entertain applications for certificates of probable cause, under 28 U.S.C. § 2253." 350 U.S. at 522. See also *House* v. *Mayo*, 324 U.S. at 48 (holding that "the judges of [the court of appeals] erred in not considering whether the case was an appropriate one for a certificate of probable cause"). Because the court of appeals properly had jurisdiction over the application for a certificate of appealability, there was a "case[] in the court[] of appeals" under the *Nixon* doctrine.

2. The court of appeals also properly had jurisdiction over the application for a certificate of appealability because this Court always has jurisdiction to review a court of appeals' jurisdictional decision. As just explained (at 24), *Nixon* v. *Fitzgerald*, *supra*, stands for the proposition that this Court may grant a writ of certiorari under Section 1254 to reverse or vacate a court of appeals' incorrect dismissal of a case for lack of jurisdiction. The Court strongly suggested in *Nixon* v. *Fitzgerald* that it may issue a statutory writ of certiorari to review a court of appeals' decision denying jurisdiction even if that decision was correct. The Court declared: "[t]here can be no serious doubt concerning our power to review a court of appeals' decision to dismiss for lack of jurisdiction — a power we have exercised routinely." *Id.* at 743 n.23. In support of that proposition, the Court cited its decision in *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978) — a case in which the Court, on a writ of certiorari, had affirmed the court of appeals' dismissal of an appeal for lack of jurisdiction. *Id.* at 478-479, 482.[18]

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[18] Similarly, this Court recently exercised its certiorari jurisdiction to affirm the decision of a court of appeals dismissing an appeal over which, because of a statutory bar (28 U.S.C. § 1447), it lacked jurisdiction. See *Things Remembered, Inc.* v. *Petrarca*, 116 S. Ct. 494 (1995). In that case, the petitioner had invoked solely 28 U.S.C. § 1254 in support of this Court's certiorari jurisdiction, and respondent disputed this Court's jurisdiction. This Court also has routinely granted writs of certiorari to reverse and vacate decisions of the courts of appeals erroneously

(continued...)

These decisions demonstrate that the Court has statutory certiorari jurisdiction to review *any* jurisdictional decision of the courts of appeals, regardless of its outcome, and regardless whether that jurisdictional decision was correct. Federal courts have the power (and duty) to determine their jurisdiction in every case. *Carden* v. *Arkoma Assocs.*, 494 U.S. 185, 195 (1990) (federal courts are "always called upon to decide" any "jurisdictional requirement[s]") (internal quotation marks omitted); *Mansfield, C. & L.M. Ry. Co.* v. *Swan*, 111 U.S. 379, 382 (1884). Jurisdictional questions therefore are always properly "in the court[] of appeals" under the *Nixon* doctrine and this Court therefore always has statutory certiorari jurisdiction to review such determinations. If, on review, the Court concludes that the court of appeals had jurisdiction to decide the merits, the merits case also was properly "in" the court of appeals and subject to this Court's statutory certiorari jurisdiction, notwithstanding the lower court's erroneous holding to the contrary. See *Nixon* v. *Fitzgerald*, 457 U.S. at 743 n.23.

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[18] (...continued)
exercising jurisdiction over the merits of cases that were not properly in the court of appeals. See *Liberty Mut. Ins. Co.* v. *Wetzel*, 424 U.S. 737 (1976) (vacating for want of jurisdiction court of appeals judgment affirming a non-final order); *Richardson-Merrell, Inc.* v. *Kohler*, 472 U.S. 424 (1985) (vacating for want of jurisdiction court of appeals judgment reversing interlocutory district court order disqualifying counsel); *Flanagan* v. *United States*, 465 U.S. 259 (1984) (reversing for want of jurisdiction court of appeals judgment affirming interlocutory district court order disqualifying counsel); *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368 (1981) (vacating for want of jurisdiction court of appeals judgment affirming interlocutory district court order denying disqualification of counsel). Although the Court did not expressly invoke Section 1254 in exercising its certiorari jurisdiction in these cases, it never suggested that the "exceptional circumstances" standard for issuance of the common-law writ of certiorari had been met.

II. THIS COURT HAS THE POWER TO ISSUE A COMMON-LAW WRIT OF CERTIORARI

Even if the Court concludes that it lacks jurisdiction to issue a statutory writ of certiorari in this case, it still has jurisdiction to issue a common-law writ of certiorari.[19] The power of this Court to issue common-law writs of certiorari is codified in the All Writs Act, 28 U.S.C. § 1651. That statute provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

The Court's power to issue "*all* writs * * * appropriate in aid of [its appellate] jurisdiction" is plenary. See *Ex parte Peru*, 318 U.S. 578, 583-585 (1943) ("the common law writs * * * may be granted or withheld in the sound discretion of the Court"); *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943) ("[T]he question * * * is not whether [a court has] power to grant the writ but whether in the light of all the circumstances the case was an appropriate one for the exercise of that power."); Richard F. Wolfson, *Extraordinary Writs in the Supreme Court Since* Ex Parte Peru, 51 COLUM. L. REV. 977, 981 (1951) ("[I]ssuance of extraordinary writs depends not upon power but solely upon considerations of discretion."). This Court is "slow to reach a conclusion which would deprive [it]

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[19] The Court may grant a common-law writ of certiorari even though the petition for certiorari did not invoke Section 1651. The Court has routinely granted writs of certiorari to review denials of leave to appeal notwithstanding the petitioner's failure to invoke jurisdiction under the All Writs Act. See cases cited note 12, *supra*. In any event, defective allegations of jurisdiction may be amended in appellate courts, including in this Court. See 28 U.S.C. § 1653; *Norton* v. *Larney*, 266 U.S. 511, 516 (1925) ("the power of this court, in its discretion, to allow such amendments [] and its duty to do so in appropriate cases, cannot be doubted"). Petitioner respectfully requests leave to amend the allegation of jurisdiction contained in his petition should the Court deem it necessary.

of the power to issue the writ in proper cases to review the action of the Federal courts inferior to the jurisdiction of this court." *McClellan* v. *Carland*, 217 U.S. 268, 279 (1910).

This Court repeatedly has held that this broad common-law power includes the authority to review decisions denying certificates of probable cause or otherwise preventing litigants from obtaining review of their claims in the courts of appeals. See Note, *Federal Court Review By Extraordinary Writ: A Clogged Safety Valve in the Final Judgment Rule*, 63 YALE L.J. 105, 108 (1953) (observing that the Court has often "utilized common law certiorari to examine thwarted attempts to reach the courts of appeals"). In *House* v. *Mayo*, this Court squarely held that the All Writs Act grants it certiorari power to "review the action of the court of appeals in declining to allow an appeal to it" for lack of a certificate of probable cause. 324 U.S. at 44 (citing *Steffler* v. *United States*, 319 U.S. 38, 39 (1943); *Holiday* v. *Johnston*, 313 U.S. 342, 348 n.2 (1941); and *In re 620 Church St. Bldg. Corp.*, 299 U.S. 24, 26 (1936)). The Court held that the common-law certiorari power "extends also to questions on the merits sought to be raised by the appeal" that the court of appeals had improperly rebuffed. 324 U.S. at 44-45.

Issuance of a common-law writ to review a denial of leave to appeal is consistent with the language of Section 1651(a) and the historic function of the writ. It is quintessentially "necessary" *and* "appropriate in aid of" this Court's appellate jurisdiction (28 U.S.C. § 1651) because it prevents a lower court from terminating a case that this Court otherwise would eventually have the power to review. In these circumstances, employment of the writ to review a lower court's denial of leave to appeal is fully consistent with the writ's traditional role as a tool for policing the exercise of jurisdiction by lower courts. "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction *or to compel it to exercise its authority when it is its*

duty to do so." *Roche*, 319 U.S. at 26 (emphasis added). See *Ex parte Peru*, 318 U.S. at 583. In the absence of such authority, inferior courts could insulate their decisions from any review simply by dismissing, or denying leave to proceed for, appeals toward which they were disinclined. See *McClellan*, 217 U.S. at 280; *Roche*, 319 U.S. at 25.[20]

Although this Court's *power* to issue common-law writs in aid of its appellate jurisdiction is plenary, it generally exercises its *discretion* to issue them only when exceptional circumstances so warrant. See *Ex parte Peru*, 318 U.S. at 584; Supreme Court Rule 20.1; Wolfson, *supra*, at 981. But the Court has repeatedly found such exceptional circumstances to exist where, as here, a lower court has erroneously barred an appeal by an unsuccessful habeas petitioner, who might have made a substantial showing of the denial of a constitutional right. See, *e.g.*, *House* v. *Mayo*, *supra*; *Rogers* v. *Teets*, 350 U.S. 809 (1955); *Burwell* v. *Teets*, 350 U.S. 808 (1955).

In *Davis* v. *Jacobs*, 454 U.S. 912 (1981), the dissent suggested that alternative forms of relief are available to petitioners who are wrongfully denied a statutorily authorized and meritorious appeal from denial of a habeas petition.[21]

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[20] Issuance of the writ is "in aid of" the Court's appellate jurisdiction even though no appeal is yet pending in the courts of appeals. See, *e.g.*, *Ex parte Kawato*, 317 U.S. 69 (1942); *Ex parte United States*, 287 U.S. 241 (1932); *Ex parte Peru*, 318 U.S. 578 (1943); *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. at 25. See generally Dallin H. Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court*, 1962 SUP. CT. REV. 153.

[21] Dissenting from the denial of certiorari in a series of habeas cases, then-Justice Rehnquist argued in *Davis* v. *Jacobs* that Section 2253 bars any certiorari review of the decisions of circuit courts disallowing appeals and that the petitions therefore must be dismissed. 454 U.S. 912, 915-919 (1981). He reasoned that a rule against certiorari review would not "result in meritorious petitions for habeas corpus slipping by unobservant or callous Courts of Appeals, thereby evading any review by this Court"

(continued...)

Although alternate forms of relief for individual petitioners remain available (see *Felker* v. *Turpin*, 116 S. Ct. 2333, 2338, 2341-2342 (1996)), none is an adequate means of "aid[ing]" this Court's appellate jurisdiction. Those alternate forms of individual relief are ineffectual tools for this Court to perform its appellate responsibilities: they do not permit the Court to engage in direct review to reconcile intercircuit conflicts or to ensure uniformity of federal law. Cf. *Forsyth*, 166 U.S. at 512 (emphasizing the importance of statutory certiorari review to prevent conflict and confusion among the circuits). An individual Justice's issuance of an original certificate of appealability may do justice in an individual case, but it is not binding precedent on a circuit (like the Eighth Circuit) that has adopted an errant rule of law regarding the standards for certificate issuance.

There are also certain errors in interpretation of Section 2253 that may be difficult or impossible for the Court to reach except through issuance of a writ of certiorari. For example, questions regarding what procedures must be followed before the courts of appeals' certificate decisions — *e.g.*, whether an applicant must be given any opportunity to file a motion or brief in support of his request for a certificate — may be unreviewable except on certiorari. A court of appeals might construe a notice of appeal as an application for a certificate and summarily deny it before the would-be appellant has any opportunity to submit an application or other paper in support of a certificate. Although the would-be appellant could file an original application for a certificate in this Court, any challenge to the summary procedure by which his application had been disposed of in the court below would be unreviewable in that proceeding: the only issue before this Court would be whether a certificate should issue. Thus, any split in the circuits

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[21] (...continued)
because "a Circuit Justice, or this Court itself, may issue a certificate of probable cause." *Id.* at 918.

regarding the procedures required for certificate decisions might go unresolved in the absence of certiorari review.[22]

Even if Section 1254(1) did not confer on this Court statutory jurisdiction to review denials of certificates, that would not mean that the Court also lacks jurisdiction to review denials of certificates under the All Writs Act. *Compare Davis*, 454 U.S. at 917 (Rehnquist, J., dissenting) (arguing that "where Congress has withheld appellate review, the All Writs Act cannot be used as a substitute for an authorized appeal"). This Court has consistently held that the purpose of Section 1651 is precisely *to supplement* other, more limited statutory grants of jurisdiction such as Section 1254. In *In re 620 Church St.*, for example, the Court explained that "the All Writs Act contemplates the employment of this writ in instances not covered by [statutory certiorari] and affords ample authority for using the writ as an auxiliary process and as a means 'of giving full force and effect to existing appellate authority and of furthering justice in other kindred ways.'" 299 U.S. at 26 (internal quotation marks omitted). Accord *Ex parte Peru*, 318 U.S. at 585 n.4; *United States* v. *Beatty*, 232 U.S. 463, 467 (1914). That its traditional use has been to supplement this Court's jurisdiction in cases the statutory certiorari power could not reach cannot reasonably be disputed. As one commentator has correctly observed, "[t]he modern significance of the common-law writ of certiorari has been that of reviewing interlocutory rulings and of reviewing courts of appeals' decisions in cases that for one reason or another were not 'in' a court of appeals so as to be reviewable by the statutory writ." Dallin H. Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court*,

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[22] *Compare* Fourth Circuit Rule 34(b) (directing clerk to notify pro se appellants that they should file a brief in support of their application) *with* J.A. 4, 41-42 (decision of Eighth Circuit construing notice of appeal as certificate request and denying "request" without providing petitioner prior opportunity to present argument).

1962 SUP. CT. REV. 153, 186. Accord ROBERTSON & KIRKHAM, *supra*, § 309, at 583-584.

Nor does Section 2253 evince a "legislative purpose to foreclose review" of denials of certificates. *Davis*, 454 U.S. at 917 (Rehnquist, J., dissenting). As we show in Section IV below, Section 2253 instead confirms Congress's intent that the Court retain its well-established and frequently exercised certiorari power to review such cases.

III. IT HAS BEEN THIS COURT'S CONSISTENT PRACTICE OVER THE PAST HALF-CENTURY TO ISSUE WRITS OF CERTIORARI TO REVIEW DECISIONS BY THE COURTS OF APPEALS DENYING LEAVE TO APPEAL

As previously explained, this Court decided in *House* v. *Mayo* in 1945 that it has the power under the All Writs Act, 28 U.S.C. § 1651, to grant a writ of certiorari to "review the action of the court of appeals in declining to allow an appeal to it" for lack of a certificate of probable cause. 324 U.S. at 44. Since the decision in *House*, the Court has repeatedly granted writs of certiorari to reverse,[23] to vacate,[24] and even to affirm[25]

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[23] See, *e.g.*, *Lynce* v. *Mathis*, 117 S. Ct. 891 (1997); *Lozada* v. *Deeds*, 498 U.S. 430 (1991); *Smith* v. *Digmon*, 434 U.S. 332 (1978); *Humphrey* v. *Cady*, 405 U.S. 504 (1972); *Walker* v. *Wainwright*, 390 U.S. 335 (1968); *Maxwell* v. *Bishop*, 385 U.S. 650 (1967); *Phelper* v. *Decker*, 385 U.S. 18 (1966); *Jennings* v. *Ragen*, 358 U.S. 276 (1959); *Rogers* v. *Teets*, 350 U.S. 809 (1955); *Burwell* v. *Teets*, 350 U.S. 808 (1955). See also *McCarthy* v. *Harper*, 449 U.S. 1309, 1310 (1981) (Rehnquist, J., in chambers) (predicting, in a case in which the court of appeals had decided the merits of an appeal notwithstanding the appellant's failure to obtain the requisite certificate of probable cause, that "this Court would grant applicant's petition for certiorari, and * * * reverse the judgment of the Court of Appeals with instructions to dismiss [the] appeal").

[24] See, *e.g.*, *Bridge* v. *Collins*, 494 U.S. 1013 (1990) (memorandum decision); *Selvage* v. *Collins*, 494 U.S. 108 (1990); *Graham* v. *Lynaugh*, (continued...)

decisions of the courts of appeals denying certificates of probable cause.

Indeed, the Court not infrequently has provided precisely the relief it is questioning its jurisdiction to give in this case — granting a writ of certiorari, vacating a court of appeals decision denying a certificate of probable cause, and remanding to that court for reconsideration in light of subsequent developments. See, *e.g.*, *Fretwell* v. *Norris*, 117 S. Ct. 2504 (1997); *Graham* v. *Collins*, 506 U.S. 461, 465 (1993). The Court also has, on at least one occasion, treated a petition for habeas corpus as a petition for certiorari in order to vacate an erroneous decision, reflecting a view that review on certiorari is the appropriate remedy for a court of appeals' improper denial of a certificate. See *In re Shuttlesworth*, 369 U.S. 35 (1962). The Court has similarly issued writs to review decisions of the courts of appeals denying leave to appeal in forma pauperis.[26]

Several of these cases have resulted in significant opinions resolving conflicts among the circuits on important issues of law. In *Lynce* v. *Mathis*, 117 S. Ct. 891 (1997), for example, the Court granted certiorari to resolve a circuit conflict about whether a Florida statute that retroactively canceled provisional release credits violated the Ex Post Facto Clause. After resolving the legal issue, the Court reversed the court of appeals' decision denying a certificate of probable cause.

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[24] (...continued)
492 U.S. 915 (1989); *In re Shuttlesworth*, 369 U.S. 35 (1962).

[25] See, *e.g.*, *Allen* v. *Hardy*, 478 U.S. 255 (1986).

[26] See, *e.g.*, *Carafas* v. *LaVallee*, 391 U.S. 234 (1968); *Nowakowski* v. *Maroney*, 386 U.S. 542 (1967); *Ragan* v. *Cox*, 369 U.S. 437 (1962); *Douglas* v. *Green*, 363 U.S. 192 (1960); *Ellis* v. *United States*, 356 U.S. 674 (1958); *Farley* v. *United States*, 354 U.S. 521 (1957); *Johnson* v. *United States*, 352 U.S. 565 (1957); *Adkins* v. *E.I. DuPont de Nemours & Co.*, 335 U.S. 331 (1948).

The Court's consistent practice of issuing writs of certiorari to review denials of leave to appeal reflects its historical conviction that it has the power to do so. Accordingly, it is itself strong evidence of the Court's jurisdiction. See, *e.g.*, *Ex parte Peru*, 318 U.S. at 585 (holding that the Court's longstanding "concurrence in the existence of its jurisdiction * * * would be beyond explanation if there had been any thought that [the Court lacked the power] to issue the writs") (citing *Stuart* v. *Laird*, 5 U.S. (1 Cranch) 299 (1803)).

IV. SECTION 2253 DID NOT ABOLISH CERTIORARI JURISDICTION OVER DENIALS OF CERTIFICATES OF APPEALABILITY

In view of the clear evidence that this Court possesses the power to issue both statutory and common-law writs of certiorari to review denials of certificates, and its uninterrupted practice for the last half-century of issuing such writs, it would require the clearest of legislative statements to retract that jurisdiction. In fact, the text, structure, and purpose of Section 2253 show precisely the opposite: Congress affirmatively intended this Court to retain its certiorari jurisdiction to review gatekeeping decisions made under Section 2253.

As this Court has frequently emphasized, interpretation of any statute must begin with the statutory text. *E.g.*, *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1990); *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Section 2253(c)(1) provides:

> Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from —
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.

Section 2253 does not mention, let alone purport to abolish, this Court's certiorari jurisdiction over the certificate decisions of courts of appeals judges; indeed, it does not refer to this Court at all. By its express terms, Section 2253 restricts access solely to one proceeding: "*an appeal * * * to the court of appeals from * * * the final order in a [habeas] proceeding.*" 28 U.S.C. § 2253(c)(1) (emphasis added).

Historically, this Court has been reluctant to determine that Congress has revoked the Court's appellate jurisdiction without a clear legislative statement to that effect. As the Court emphasized in analyzing an analogous provision of the AEDPA, "[r]epeals [of appellate jurisdiction] by implication are not favored." *Felker*, 116 S. Ct. at 2338. See also *Ex parte McCardle*, 74 U.S. 506, 515 (1868); *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 279-280 (1821). In light of this rule, the dearth of *any* language in Section 2253 that can reasonably be construed to abolish certiorari review of certificate-of-appealability decisions alone is sufficient to establish that Section 2253 does not erect such a prohibition. See, *e.g.*, *Demarest* v. *Manspeaker*, 498 U.S. 184, 190 (1991) ("When we find the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances.").

Elsewhere in the AEDPA, Congress *did* provide a very clear statement of its intent to eliminate certiorari review over *another* gatekeeping decision, demonstrating that it knows how to do so when that is its purpose. The AEDPA requires the courts of appeals to make two different gatekeeping determinations. Section 2253(c) — at issue here — requires courts of appeals to determine whether to issue a certificate as a predicate to an appeal from the denial of a *first* habeas petition. Section 2244(b)(3) requires courts of appeals to determine whether to issue an order as a predicate to a district court's consideration of a *second or successive* habeas petition.

Congress left no doubt that the court of appeals' determination whether to authorize a successive petition pursuant to Section 2244 is not directly reviewable by any court:

> The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable *and shall not be the subject of a petition* for rehearing or *for a writ of certiorari.*

28 U.S.C. § 2244(b)(3)(E) (emphasis added). See *Felker*, 116 S. Ct. at 2338-2339. Tellingly, Section 2253(c) contains no similar prohibition on review by "a petition for rehearing or a writ of certiorari" of a *certificate of appealability* decision. Congress's decision not to include an analogous provision in Section 2253 reflects its affirmative intent to retain certiorari review in this context.

"Nothing, indeed, but a different intent explains the different treatment." *Lindh,* 117 S. Ct. at 2064. As this Court held just last Term, Congress's intent under the AEDPA is apparent when it inserts certain language in only one of two parallel provisions. *Id.* at 2059. In *Lindh*, the Court inferred that Congress did not intend other, analogous sections to be applied retroactively. That logic is equally applicable here.[27]

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[27] Congress made a similarly clear statement prohibiting appellate review by this Court absent a certificate of probable cause in the 1908 statute that preceded Section 2253:

> from a final decision by a court of the United States in a proceeding in *habeas corpus* where the detention complained of is by virtue of process issued out of a state court *no appeal to the Supreme Court shall be allowed* unless the United States court by which the final decision was rendered or a justice of the Supreme Court shall be of opinion that there exists probable cause for an appeal, in which event, on allowing the same, the said court or justice shall certify that there is probable cause for such allowance.

Act of March 10, 1908, ch. 76, 35 Stat. 40 (emphasis added). In light of (continued...)

Reading the AEDPA consistently with its plain language — to permit certiorari review of decisions disallowing appeal from denials of first federal habeas petitions but not of decisions disallowing second or successive federal habeas petitions — is entirely sensible. This Court has recognized the critical importance of one full, fair review of a first claim for habeas relief — particularly for federal prisoners, who (unlike state prisoners) have no prior opportunities for collateral review. "Dismissal of a first federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar* v. *Thomas*, 116 S. Ct. 1293, 1299 (1996). The availability of review by this Court of a decision cutting off a right to appeal from denial of a first petition therefore serves important constitutional values by safeguarding the decision's accuracy and fairness. In contrast, "'second and successive' petitions * * * pose a greater threat to the State's interests in 'finality' and are less likely to lead to the discovery of unconstitutional punishments." *Ibid.* Accordingly, certiorari review of such decisions is less critical to fairness and may frustrate the heightened interest in finality in the successive petition context.

Similarly, Congress provided a less restrictive *standard* for the courts of appeals to apply in deciding whether to issue a certificate of appealability from denial of a first petition, than it provided for deciding whether to permit the filing of a second

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[27] (...continued)
that clear statement in the 1908 Act, this Court found itself without the power to allow direct appeals in cases in which no certificate of probable cause had issued. *E.g.*, *Bilik* v. *Strassheim*, 212 U.S. 551 (1908); *Ex parte Patrick*, 212 U.S. 555 (1908). Congress modified that statute in 1925 to require a certificate as a predicate solely to the court of appeals' jurisdiction, rather than to this Court's. Act of Feb. 13, 1925, ch. 229, § 6(d), 43 Stat. 940.

or successive petition.[28] This difference confirms that Congress intended the two gatekeeping decisions to operate differently, permitting greater access to appeals from first petitions than to successive petitions.

That this Court has consistently exercised its certiorari power to review certificate decisions by the courts of appeals for the last half-century only strengthens the conclusion that Congress's failure to forbid certiorari review of gatekeeping decisions under Section 2253 was intentional. In 1996, when Congress amended the certificate requirement contained in Section 2253, it was legislating against a background of five decades of this Court's decisions reversing courts of appeals' denials of certificates of probable cause. Those decisions implicitly interpreted the prior version of Section 2253 not to preclude such review. Yet in amending Section 2253, Congress chose not to proscribe or even to address the issue of certiorari review.[29] Congress's cognizance of the availability of certiorari review of gatekeeping decisions (reflected in its prohibition against such review in Section 2244) and its acquiescence in this Court's persistent exercise of that power strongly indicate its endorsement of the continued availability of certiorari review. See *Monessen Southwestern Ry.* v. *Morgan*, 486 U.S. 330, 338 (1988); *Francis* v. *Southern Pac. Co.*, 333 U.S. 445, 449 (1948).

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[28] *Compare* 28 U.S.C. § 2253(c)(2) (requiring only that the would-be appellant make "a substantial showing of the denial of a constitutional right") with *id.* § 2244(b)(2) (requiring, among other things, that the second or successive petitioner show "that the claim relies on a *new rule* of constitutional law, *made retroactive* to cases on collateral review by the Supreme Court that *was previously unavailable*") (emphasis added).

[29] Congress's failure to reverse this Court's assertion of certiorari power legislatively is even more striking in light of the fact that several Justices had, in two published dissents, argued that Section 2253 should be interpreted to deprive the Court of its certiorari power. See *Davis* v. *Jacobs*, 454 U.S. 912 (1981); *Jeffries* v. *Barksdale*, 453 U.S. 914 (1981).

Interpretation of Section 2253 to allow certiorari review would not undermine the purpose of that provision to reduce the burden on this Court and the States imposed by frivolous habeas appeals. *Compare* 454 U.S. at 917-918 (Rehnquist, J., dissenting). To the contrary, interpretation of Section 2253 to *forbid* certiorari review would only unleash a torrent of original applications for certificates of appealability and petitions for habeas corpus in this Court. Because, in the absence of certiorari review of decisions on the appealability of first petitions, some circuits will apply erroneous standards in rejecting certificates of appealability (see page 30, *supra*), many of those applications may be meritorious. Nor would interpretation of Section 2253 to permit certiorari review burden the "States [with] the necessity of responding to the volume of frivolous appeals." *Davis*, 454 U.S. at 917-918 (Rehnquist, J., dissenting). This Court's Rules expressly authorize respondents to refrain from filing an opposition to a petition for certiorari, "except in a capital case * * * or when ordered by the Court." Sup. Ct. Rule 15.1. States routinely avail themselves of this option when a petition is frivolous. See ROBERT L. STERN, EUGENE GRESSMAN, et al., SUPREME COURT PRACTICE 375 (7th ed. 1993).

Finally, any effort to insert into Section 2253 a prohibition of certiorari review would run afoul of the principle that statutes should be construed to avoid constitutional difficulties whenever possible. See *Rust* v. *Sullivan*, 500 U.S. 173, 190 (1991); *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 500 (1979). Interpretation of Section 2253 to foreclose any review of refusals to allow meritorious appeals from the denial of habeas relief would raise questions about the Act's constitutionality under the Exceptions Clause of the Constitution. See *Felker*, 116 S. Ct. at 2342 & n.2 (Souter, Stevens & Breyer, JJ., concurring) (noting that, if the AEDPA were interpreted to foreclose review of gatekeeping decisions under the All Writs Act, a serious "question whether the statute exceeded Congress's Exceptions Clause power would be open" and observing that "[t]he question

could arise if the Courts of Appeals adopted divergent interpretations of the gatekeeping standard").[30] This Court adopted the rule that Congress must provide a clear statement of its intent to deprive courts of jurisdiction in part to avoid these difficult constitutional questions. See, *e.g.*, *Webster* v. *Doe*, 486 U.S. 592, 603 (1988); *Johnson* v. *Robison*, 415 U.S. 361, 366-367 (1974).

In sum, precedent, history and legislative design leave no room for doubt: the Court has jurisdiction to grant certiorari, vacate, and remand this case per the suggestion of the Solicitor General.

V. THIS COURT HAS CERTIORARI JURISDICTION BECAUSE THE AEDPA DOES NOT APPLY RETROACTIVELY TO THIS CASE

Even if this Court were to conclude that, as a general matter, it lacks certiorari jurisdiction to review cases in which the petitioner has been denied a certificate of appealability by the court of appeals, the Court could still grant certiorari, vacate, and remand in this case. This Court's recent decision in *Lindh* confirms that the AEDPA's certificate-of-appealability requirement does not apply retroactively to Section 2255 movants who, like Arnold Hohn, filed their motion in the district court before the AEDPA was enacted. Thus, petitioner was entitled to an appeal as of right to the Eighth Circuit under

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[30] See Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953) (Congress may not under the Exceptions Clause "destroy the essential role of the Supreme Court in the constitutional plan"); Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 161 (1960) (providing "a tribunal for the ultimate resolution of inconsistent or conflicting interpretations of federal law by state and federal courts" is an essential function of the Court).

28 U.S.C. § 2253 (1995). Accordingly, no bar exists to this Court's certiorari jurisdiction in this case.[31]

In *Lindh*, the Court addressed the question whether the AEDPA should be applied retroactively. The AEDPA made various amendments to Chapter 153 of Title 28 of the United States Code, which governs all habeas corpus proceedings in the federal courts, and created an entirely new Chapter 154, which establishes special rules for habeas proceedings against a State in capital cases. Observing that Section 107(c) of the AEDPA expressly states that "Chapter 154 * * * shall apply to cases pending on or after the date of enactment of this Act" (110 Stat. 1226), but that the statute does not indicate whether Chapter 153 should be applied retroactively, the Court concluded that "[t]he statute reveals Congress's intent to apply the amendments to chapter 153 only to such cases as were filed after the statute's enactment." *Lindh*, 117 S. Ct. at 2063. By negative implication, the Court reasoned, Congress intended for the amendments contained in Chapter 153 to apply only to cases filed after the AEDPA had been passed:

> We read this provision of § 107(c), expressly applying Chapter 154 to all cases pending at enactment, as indicating implicitly that the amendments to Chapter 153 were assumed and meant to apply to the general run of habeas cases only when those cases had been filed after the date of the Act.

The AEDPA's new certificate-of-appealability requirement for federal prisoners was an amendment to Chapter 153. Because *Lindh* held that "the new provisions of Chapter 153 gen-

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[31] Recent precedent confirms this point. In *Fretwell* v. *Norris*, 117 S. Ct. 2504 (1997), the Court granted certiorari in a case in which the court of appeals had denied a certificate of appealability to a petitioner who had filed his habeas petition prior to the Act's effective date, but had filed his appeal after that date. The Court vacated and remanded in light of *Lindh*.

erally apply only to cases filed after the Act became effective" (*id.* at 2068), it is now clear that the certificate requirement applies only to Section 2255 motions filed after the effective date of the AEDPA. Hohn filed his Section 2255 motion three months before the AEDPA was enacted, and it consequently is not subject to the certificate requirement. Under pre-AEDPA law, Hohn is entitled to an appeal to the Eighth Circuit as a matter of right. See 28 U.S.C. § 2253 (1995); see also *United States* v. *Perez*, 129 F.3d 255, 259 (2d Cir. 1997) ("Before the AEDPA, a defendant was not required to make any threshold showing to appeal the denial of his § 2255 motion.").

The overwhelming majority of federal courts have concluded that, under the *Lindh* analysis, Section 2255 movants who filed their motions before the AEDPA became law but who filed a notice of appeal after the date of enactment are not subject to the certificate-of-appealability requirement. See *United States* v. *Perez*, 129 F.3d at 260 ("[t]he most reasonable conclusion to be drawn from *Lindh* is that an appellant need not obtain a COA to appeal the denial of his § 2255 motion so long as he filed the motion before April 24, 1996"); *United States* v. *Kunzman*, 125 F.3d 1363, 1364 n.2 (10th Cir. 1997); *United States* v. *Skandier*, 125 F.3d 178 (3d Cir. 1997); *Koo* v. *McBride*, 124 F.3d 869, 872 & n.3 (7th Cir. 1997); *Hardwick* v. *Singletary*, 122 F.3d 935 (11th Cir. 1997); *Arredondo* v. *United States*, 120 F.3d 639 (6th Cir. 1997); *United States* v. *Carter*, 117 F.3d 262, 264 (5th Cir. 1997).

Standing against this array of circuits are the Eighth Circuit and the Solicitor General. In his brief responding to our petition for certiorari, the Solicitor General attempted to distinguish *Lindh* by arguing that Hohn's "case" was not filed before the enactment of the AEDPA because Hohn's "case" in the court of appeals was entirely different from his "case" in the district court. U.S. Resp. 11. He maintained that, because Hohn filed his "case" in the court of appeals after the AEDPA was enacted, Hohn was subject to the certificate-of-appealability requirement. *Ibid.* The only court of appeals to have addressed

the government's argument has categorically rejected it. See *United States* v. *Skandier*, 125 F.3d 178, 182 (3d Cir. 1997). And the only court of appeals to accept the government's view of the statute's retroactivity — the Eighth Circuit in *Tiedeman* v. *Benson*, 122 F.3d 518 (1997) — did so not because the appellate phase constitutes a different "case" but because it could "think of no reason why a new provision exclusively directed towards appeal procedures would depend for its effective date on the filing of a case in a trial court." *Id.* at 521.[32]

But the *Tiedeman* panel erroneously dismissed the dispositive "reason": this Court's decision in *Lindh*. *Lindh* did not expressly address the retroactivity of Section 2253; but its rationale is nonetheless dispositive of that issue. In explaining that it granted certiorari in light of the split between circuits over whether the new Section 2254(d) provisions should apply to pending cases, the *Lindh* Court cited (in addition to several cases involving Section 2254(d)) *Hunter* v. *United States*, 101 F.3d 1565 (11th Cir. 1996) (en banc). See *Lindh*, 117 S. Ct. at 2062. *Hunter* held that the certificate-of-appealability requirement applies to cases filed in the district court before the AEDPA became law. *Hunter*, 101 F.3d at 1573. As the Second Circuit has noted, "[t]he Court's reference to *Hunter* strongly indicates that it intended to address the retroactivity of *all* the new chapter 153 provisions enacted by the AEDPA." *Perez*, 129 F.3d at 260 (emphasis added). Indeed, the Eleventh Circuit

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[32] If the Court determines that it lacks jurisdiction over decisions of the courts of appeals denying certificates of appealability because those cases are not "in" the court of appeals under 28 U.S.C. § 1254(1), it will necessarily have rejected the central premise of the government's argument concerning *Lindh*. The government's argument is predicated on the notion that Hohn's "case" in the court of appeals was a different "case" from the one in the trial court, and that the critical date is when Hohn's "case" in the court of appeals was filed. But if the Court lacks jurisdiction over the Eighth Circuit's decision below because there was no "case[] in the court[] of appeals," that basis for distinguishing *Lindh* would fall too.

subsequently determined that its en banc decision in *Hunter* had been overruled by the decision in *Lindh*. See *Hardwick* v. *Singletary*, 122 F.3d 935, 936 (11th Cir. 1997). As these courts recognize, *Lindh* compels the conclusion that the certificate-of-appealability requirement does not apply to Section 2255 motions — like Hohn's — that were pending in the district court at the time of the AEDPA's enactment.

That application of *Lindh* is sensible from a judicial administration perspective. A rule that all the new amendments to Chapter 153 apply prospectively to cases filed in the district court after the effective date of the AEDPA promotes uniformity and will reduce litigation. Absent such a rule, there will be a period of prolonged uncertainty while the question whether each particular provision of Chapter 153 of the AEDPA is retroactive will be disputed.

Under *Lindh*, the certificate-of-appealability requirement does not apply to Hohn's appeal. The Eighth Circuit erred when it applied the AEDPA retroactively to this case, and no provision in the AEDPA can prevent this Court from issuing a writ of certiorari to review the Eighth Circuit's decision.[33]

VI. THIS COURT, OR ANY OF ITS MEMBERS, SHOULD GRANT A CERTIFICATE OF APPEALABILITY

If the Court determines that it lacks the power to review the court of appeals' decision, petitioner respectfully requests that the Court or any individual Justice issue him a certificate of appealability so that he may obtain the relief to which he is

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[33] If the Court assumes jurisdiction after concluding that the certificate-of-appealability requirement does not apply retroactively to this case, that would moot the government's confession of error (which pertains only to the proper application of the standard in Section 2253). In that event, the Court should remand with instructions to the Eighth Circuit to consider Hohn's appeal as of right on the merits.

entitled — the right to have his meritorious appeal of the denial of Section 2255 relief heard by the court of appeals.[34]

Congress plainly has authorized this Court or any individual Justice to issue Hohn a certificate of appealability. The AEDPA expressly grants that power to "a circuit justice." 28 U.S.C. § 2253(c)(1). On numerous occasions, this Court has acted on applications for certificates of probable cause.[35] Similarly, the power of any individual Justice to grant a certificate cannot seriously be disputed.[36]

Under the AEDPA, petitioner is entitled to a certificate of appealability if he can make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). That standard is met when the issues are "debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are *adequate to deserve encouragement to proceed further*." *Lozada* v. *Deeds*, 498 U.S. 430, 432 (1991) (quoting *Barefoot* v. *Estelle*, 463 U.S. 880, 893 n.4 (1983)) (internal quotation marks omitted) (emphasis added). The issues

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[34] Petitioner is filing a separate application for a certificate of appealability pursuant to Supreme Court Rule 22. That application presents the same arguments made in this Section.

[35] *E.g.*, *Derrick* v. *Collins*, 497 U.S. 1042 (1990); *O'Rear* v. *Attorney General*, 484 U.S. 1078 (1988); *In re Hunt*, 348 U.S. 968 (1955).

[36] *E.g.*, *Autry* v. *Estelle*, 464 U.S. 1301 (1983) (White, J., in chambers) (granting certificate); *Rosoto* v. *Warden*, 83 S. Ct. 1788 (1963) (Harlan, J., in chambers). See also *Davis* v. *Jacobs*, 454 U.S. at 913-914 (opinion of Stevens, J., respecting the denial of certiorari) ("Because we have that authority, it is part of our responsibility in processing these petitions to determine whether they have arguable merit notwithstanding the failure of a district or circuit judge to authorize an appeal to the Court of Appeals."); *id.* at 918 (dissenting opinion of Rehnquist, J.) (arguing that removing the Court's jurisdiction to review denials of certificates "in no way bars consideration of the merits of a petition which any Member of this Court believes to be deserving of a certificate of probable cause").

in this case are clearly "debatable among jurists of reason," as Judge McMillian's dissent explains. J.A. 42-48.[37]

Hohn is currently in federal custody for conduct that this Court unanimously determined in *Bailey* v. *United States*, 116 S. Ct. 501 (1995), was not criminal. This situation violates the Constitution in at least two ways. It violates the Fifth and Sixth Amendments because the jury instructions at Hohn's trial did not require the jury to make findings on every essential element of the Section 924(c) offense. See *United States* v. *Gaudin*, 515 U.S. 506, 522-523 (1995). And it violates the Due Process Clause because the evidence admitted at Hohn's trial was insufficient to support a conviction under Section 924(c)(1). See *Jackson* v. *Virginia*, 443 U.S. 307, 313-316 (1979). Hohn has made a substantial showing that his constitutional rights have been denied in both of these respects.

This Court has recently reaffirmed that "[t]he Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." *Gaudin*, 515 U.S. at 522-523. The instructions on the Section 924(c) count at Hohn's trial grossly misstated the law, and Hohn was accordingly deprived of his constitutional right to have a jury determine his guilt beyond a reasonable doubt of every element of that crime. The jury was charged that

> [t]he phrase "used a firearm" means *having a firearm available* to aid in the commission of possession of Methamphetamine with intent to distribute. Similarly, the

[37] The Solicitor General has all but admitted that petitioner is entitled to a certificate of appealability. He has conceded that the jury instruction at Hohn's trial was erroneous in light of this Court's subsequent decision in *Bailey* and that the claims raised in Hohn's Section 2255 motion are of constitutional dimension. And, although the Solicitor General argued that the Eighth Circuit should be provided the first opportunity to determine whether Hohn's claims are "substantial" under Section 2253(c)(2), he failed even to assert that Hohn's claims are not substantial.

> phrase "carried a firearm" *does not require proof of actual possession* of a firearm or use of it in any affirmative manner, but does require proof beyond a reasonable doubt that the firearm was *available to provide protection* in connection with the possession of Methamphetamine with intent to distribute or facilitate success.

J.A. 10 (emphasis added). This instruction clearly allowed the jury to convict Hohn of "using a firearm" under a definition of that crime that is manifestly erroneous in light of *Bailey*.

The jury instructions' definition of "carrying a firearm" is similarly erroneous because it essentially repeats the invalid "use" instruction and authorizes a conviction where the firearm is merely "available" for use — a theory rejected as excessively broad in *Bailey*. In any event, Hohn's constitutional rights would be violated *even if the "carrying" instruction were entirely proper*. Because the instructions at Hohn's trial misstated the law with respect to use, it is impossible to negate the possibility that the jury rested Hohn's conviction on a *legally* erroneous ground. Under *Griffin* v. *United States*, 502 U.S. 46 (1991), such a verdict cannot stand. See *id.* at 59 ("When * * * jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error."); see also *United States* v. *Ryan*, 41 F.3d 361, 365 (8th Cir. 1994) (en banc). Thus, under established law it must be presumed that Hohn is currently incarcerated for "using a firearm" even though no jury has ever found beyond a reasonable doubt that his conduct violated 18 U.S.C. § 924(c), as construed by this Court in *Bailey*.

Because the jury instruction on the Section 924(c) count were legally erroneous, Hohn's Fifth and Sixth Amendment rights have indisputably been violated. The Solicitor General has failed to suggest how petitioner's constitutional challenge to the jury instructions, which he has conceded contravened *Bailey*, could be anything other than "substantial." Issuance of a certificate of appealability therefore is clearly warranted.

Moreover, there is a second, independent ground for Hohn's constitutional challenge to his continued incarceration: the evidence presented at his trial was insufficient to support a conviction under Section 924(c)(1). That shortcoming gives rise to a claim under the Due Process Clause which, if valid, entitles Hohn not just to a new trial, but to a judgment of acquittal. It is clear in light of *Bailey* that no evidence was admitted at Hohn's trial that could support a conviction under the "use" prong of Section 924(c). The government has argued, however, that Hohn's constitutional claim would not be substantial unless the evidence similarly could not support a conviction under Section 924(c)'s "carry" prong.

Contrary to the government's contention, the evidence at Hohn's trial was woefully insufficient to show beyond a reasonable doubt that Hohn violated Section 924(c) by "carrying" a firearm "during" the predicate offense. Although this Court recently granted certiorari to resolve a conflict in the courts of appeals over the precise contours of the "carry" prong of Section 924(c) (*Muscarello* v. *United States*, No. 96-1654; *Cleveland* v. *United States*, No. 96-8837, 1997 WL 195307 (Dec. 12, 1997)), it did so in vehicular cases where the defendants were moving in tandem with the firearms. Even if immediate accessibility of the firearm is sufficient in that context, it is not sufficient in a case such as this, where there was *no* evidence (only speculation) that the defendant ever bore the firearm on his person or otherwise moved in tandem with it *during* the predicate drug offense. Indeed, we are aware of *no* post-*Bailey* decision of *any* court of appeals under which the facts of *this* case would support a conviction for "carrying" a firearm under Section 924(c).

Any doubt about the outcome in the Eighth Circuit, moreover, has been erased by that court's recent decision in *United States* v. *McKinney*, 120 F.3d 132 (8th Cir. 1997), on remand from 117 S. Ct. 1544 (1997). In *McKinney*, the defendant had been convicted under Section 924(c) based on the mere presence of guns in the location in which he had sold drugs.

The Eighth Circuit concluded that those facts did not support a conviction under Section 924(c) either for "using" or for "carrying" a firearm. Further, it held that it was *plain error* for the trial court even to submit the case to the jury on the "carrying" theory, because "[h]aving a gun available for use, even an immediate use, is simply not the equivalent of carrying it." *Id.* at 134; see also *id.* at 133 ("In all of the cases in which we have upheld convictions for carrying guns during or in relation to a drug-trafficking offense, the defendant has had the weapon either in a car's hatchback, in the passenger compartment of a car, or on his person, and was thus carrying the offending weapons in an obvious, literal way."). If it was plain error for the district court to submit a "carrying" charge to the jury in *McKinney*, the same is true *a fortiori* in this case.

Thus, because Hohn has easily made a "substantial showing" with respect to his Due Process Clause claim concerning the insufficiency of the evidence that he "carried" a firearm, he is entitled to a certificate of appealability under the standard in Section 2253(c)(2). He therefore respectfully asks the Court or any individual Justice to issue him a certificate of appealability to enable him to take his meritorious appeal of the denial of his Section 2255 motion.

CONCLUSION

This Court should vacate the decision below and remand per the suggestion of the Solicitor General. In the alternative, the Court should either vacate and remand with instructions to consider Hohn's appeal, or grant Hohn a certificate of appealability.

Respectfully submitted.

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DECEMBER 1997

APPENDIX

18 U.S.C. § 924. Penalties.

* * *

(c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and--

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

* * *

28 U.S.C. § 1254. Courts of appeals; certiorari; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

* * *

28 U.S.C. § 1651. Writs.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

* * *

28 U.S.C. § 2244. Finality of determination.

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

* * *

28 U.S.C.§ 2253. Appeal.

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).